IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Proceedings for the Revocation of the License of GEORGE H. BUCK to Practice Medicine and Surgery in the State of Oregon

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BOARD OF MEDICAL EXAMINERS OF THE STATE OF OREGON,

Plaintiff-Appellee,

vs.

DR. GEORGE H. BUCK,

Defendant-Appellant

Jurisdiction

The judgment of the Supreme Court of the State of Oregon was entered on the 3rd day of June, 1953. A Petition for Rehearing, filed on the 10th day of September, 1953, was denied on the 15th day of September, 1953. The jurisdiction of the Supreme Court of the United States is invoked under 28 U. S. C. A., Section 1257.

Question Presented

Whether Defendant-Appellant is deprived of his profession and property rights without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States.

Statement

The statute in question, 54-931 O. C. L. A., at the time of the institution of the proceedings for the revocation of the

license, read as follows: "The Board may refuse to grant a license to any applicant who desires to practice medicine and surgery in this state or may suspend or revoke such licenses for any of the following reasons:

(a) Unprofessional or dishonorable conduct;

(b) The procuring or aiding or abetting in procuring an abortion unless such is done for the relief of a woman whose health appears in peril because of her pregnant condition after due consultation with another duly licensed medical physician and surgeon;".

Chapter 265, Oregon Laws of 1951, without a savings clause, insofar as is pertinent to the question herein, read as follows: "Section 3. Section 54-931, O. C. L. A., is amended to read as follows: Sec. 54-931. The board may refuse to grant a license to any applicant who desires to practice medicine and surgery in this state or may suspend or revoke such licenses for any of the following reasons:

(1) Unprofessional or dishonorable conduct.

(2) The procuring or aiding or abetting in procuring an abortion unless such is done for the relief of a woman whose health appears in peril because of her pregnant condition after due consultation with another duly licensed medical physician and surgeon who is not an associate or relative of the physician or surgeon and who agrees that an abortion is necessary. The record of this consultation shall be in writing and shall be maintained in the hospital where the consultation occurred or in the offices of all physicians and surgeons involved for a period of at least three years after the date of such abortion."

(S.) RALPH E. MOODY,
Counsel for Appellant.

STATE OF OREGON,
County of Marion, ss:

I, Ralph E. Moody, hereby certify that I am the attorney for the Defendant-Appellant in the within entitled cause and that I this date mailed in the United States Postoffice at Salem, Oregon, a certified copy of the foregoing statement to Howard I. Bobbit, attorney for Plaintiff-Appellee, at his office address at 609 Failing Building, Portland, Oregon, with postage fully prepaid, thereon, and that there is direct mail communication between Salem, Oregon and Portland, Oregon.

Dated this 24th day of September, 1953.

(S.) RALPH E. MOODY.

STATE OF OREGON,
County of Marion, ss:

I, Arthur S. Benson, Clerk of the Supreme Court of the State of Oregon, do hereby certify that the foregoing copy of Statement filed Nov. 24, 1953, in the case of Board of Medical Examiners of the State of Oregon, appellee v. Dr. George H. Buck, appellant, has been by me compared with the original and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record, and in my office and custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Salem, Oregon, November 24, 1953.

ARTHUR S. BENSON,
[SEAL.] *Clerk of Supreme Court, State of Oregon.*

APPENDIX "A"

OPINION OF THE SUPREME COURT OF OREGON

IN THE SUPREME COURT OF THE STATE OF OREGON

IN BANC

In the Matter of the Proceedings for the Revocation of the License of GEORGE H. BUCK to Practice Medicine and Surgery in the State of Oregon

BOARD OF MEDICAL EXAMINERS OF THE STATE OF OREGON, *Respondent,*

v.

DR. GEORGE H. BUCK, *Appellant*

Appeal from Circuit Court, Multnomah County

Charles H. Combs, Judge

Argued and Submitted April 15, 1953

Ralph E. Moody, of Salem, argued the cause for appellant. With him on the brief were Moody & Lamkin, Douglas L. Hay and Henry M. Hanzen, all of Salem.

Howard I. Bobbitt, of Portland, argued the cause and filed a brief for respondent.

BRAND, *J.:*

Affirmed.

Supreme Court, State of Oregon. Filed June 3, 1953. (S.) Arthur S. Benson, Clerk.

BRAND, *J.:*

This is an appeal from a judgment of the circuit court of the State of Oregon for Multnomah County affirming an order of the Board of Medical Examiners of the State of Oregon, which order revoked the license of George H. Buck

to practice medicine and surgery in the State of Oregon. The original complaint in this case was filed in 1946 followed by an amended complaint in December of that year. The amended complaint contained 14 counts but each one was based upon the same general charge, namely, the causing of an abortion by operation upon or treatment of one Frances Rasmussen. In some counts the death of the child, and in others, the death of the mother, was alleged. The defendant received due notice, filed an answer and testified at the hearing. The Medical Board made findings of fact and conclusions of law sustaining the charges and on the second day of May, 1947, entered an order revoking the defendant's license to practice. Appeal was taken to the circuit court where the issues were determined solely upon the sufficiency of the pleading. It was held that none of the counts stated facts constituting sufficient ground for the revocation of the license. The order of the Board was reversed and it was directed to reinstate the defendant as a duly licensed physician. The Board appealed to this court and after hearing we reversed the judgment of the trial court and remanded the cause with directions to proceed with the trial of the appeal according to the provisions of OCLA, § 54-933. Our opinion appears in 192 Or. 66, 232 P. 2d 791. We are satisfied with the conclusions there set forth and shall not reconsider or review them here.

Pursuant to the order of this court, the circuit court entertained the appeal and affirmed the order of the Board revoking the license of the defendant. Now, nine and one-half years after the commission of the abortion, and six years after the institution of these proceedings, the case is again before us upon appeal. At the hearing before the circuit court, the defendant moved for an order quashing the information upon the ground that OCLA, § 54-931 was amended by Oregon Laws 1951, ch. 265. The motion was denied and the defendant now assigns that ruling as error. The contention is that since the act of 1951 contained no saving clause as to proceedings instituted prior to the date of the amendment, the enactment of the Amendment "operates as a repeal of provisions of the amended act which are changed by and repugnant to the amendatory act." The

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proceeding for revocation of the license was brought under the provisions of OCLA, § 54-931 which, so far as material here, reads as follows:

> "The board may refuse to grant a license to any applicant who desires to practice medicine and surgery in this state or may suspend or revoke such licenses for any of the following reasons:
>
> "(a) Unprofessional or dishonorable conduct;
>
> "(b) The procuring or aiding or abetting in procuring an abortion unless such is done for the relief of a woman whose health appears in peril because of her pregnant condition after due consultation with another duly licensed medical physician and surgeon;
>
> • • • "

The amendment adopted in 1951 added after the last word of (b) certain new matter so that the section would require consultation with another duly licensed medical physician and surgeon "who is not an associate or relative of the physician or surgeon and who agrees that an abortion is necessary. The record of this consultation shall be in writing and shall be maintained in the hospital where the consultation occurred or in the offices of all physicians and surgeons involved for a period of at least three years after the date of such abortion."

The trial court considered this proposition, and in denying the motion to quash, expressed the opinion that the amendment was not inconsistent with the provisions of OCLA, § 54-931 (b). Counsel for the defendant relies upon the rule that where a law and an amendment thereto are so repugnant that both measures cannot be enforced there is an implied repeal of the earlier statute. He then cites authority to the effect that "the repeal of a law conferring jurisdiction takes away all right to proceed, under the repealing statute, as to all actions, suits or proceedings pending at the time of the repeal, unless there is a saving clause in the repealing statute, and this is so in an appellate as well as the court of original jurisdiction." State v. Ju Nun, 53 Or. I, 97 P. 96, 98 P. 513; Drainage Dist. No. 7 v. Ber-

nards, 89 Or. 531, 174 P. 1167; State v. Moore, 192 Or. 39, 233 P. 2d 243; 50 Am. Jur. Statutes, § 530, p. 536, § 552, p. 556. The defendant's difficulty is that the cases cited have no applicability to the issue here presented.

The 1951 act repealed no part of OCLA, § 54-931 (b). It reenacted all of that subsection and merely added other requirements. Insofar as the two acts are the same, the new act is regarded as a mere continuation of the earlier one so that only the new provisions are to be considered as having been enacted at the time of the amendment. 50 Am. Jur. Statutes, § 468, p. 482.

Prior to 1951 a license might be revoked unless the abortion is performed for the relief of a woman whose health appears in peril because of her pregnant condition after due consultation with another physician. After 1951 the license may still be revoked under the same conditions. After 1951 there were additional grounds for revocation not previously applicable. Even though he confers as required under OCLA, § 54-931 (b) the license may still be revoked if the conference is not held and recorded as required in the 1951 act. Defendant's argument amounts merely to this: That the license of a physician who violates one provision of the professional code cannot be revoked because he did not violate all of them. There is no repugnancy between the two acts. The conduct of a physician previous to the 1951 amendment is tested by the statute then and now in force. Any conduct after the enactment of 1951 is to be tested by all of the provisions both old and new. No saving clause was required.

Defendant also assigns as error the insufficiency of the complaint. That issue was determined adversely to the defendant's contention on the previous appeal to this court. We decline to discuss it further. The only other assignments of error relate to the alleged insufficiency of the evidence.

The complaint alleges in substance that Dr. Buck, a licensed physician, in October, 1943, performed an abortion upon Frances Rasmussen who was then in a pregnant condition, and "That the health of the said Frances Rasmussen was not in peril because of her pregnant conditon, and

that the said George H. Buck did not duly consult wit another duly licensed medical physician and surgeon pri to performing said abortion." Other allegations ampli the charge thus briefly stated, asserting alternative mea by which the act was performed, and the death of the chi and of the mother. The findings of fact by the Board su port the allegations of the complaint.

The statute authorizing appeal to the circuit court fro the order of the Board provides:

> "(e) On appeal the court shall be confined to t record certified by the secretary of the board.
>
> "(f) The court shall consider the record so certifie and may affirm or reverse the order of revocation suspension entered by the board.
>
> "(g) The court may only reverse the order of t board if: (1) the complaint does not state sufficie grounds for the action of the board; or (2) there is legal evidence to support the action of the board; (3) the board did not have jurisdiction of the matt or the accused.
>
> * * *" 59 OLA, § 54-933.

The circuit court reviewed the evidence and found th the Board had jurisdiction of the subject matter and t accused and that there was legal evidence to support t order of revocation.

We deem it unnecessary to review the voluminous reco in the case at any great length. The evidence disclosed th Frances Rasmussen was pregnant and intended to apply the defendant for an abortion. She was apparently in go health. Her pregnancy was normal. Dr. Buck testified th she would carry her baby through the term and that she h no infection until after the delivery. He did not call any other physician for consultation. He testified that s was not miscarrying when he first saw her. He also tes fied, "She asked me to take care of her when she was mi carrying, and I said I never refused calls when people a in trouble." A witness who accompanied Frances Rasmu sen to Dr. Buck's office testified that Frances Rasmuss

asked him "if he done abortions, and he said Yes, that he had done a lot of them." The doctor said that he charged $50, and $50 extra for each month more that she was pregnant. The doctor claimed that Frances Rasmussen had attempted to abort herself, but admitted that he administered a drug to aid in a quicker expulsion of the fetus. The fetus was removed and Frances Rasmussen died of post abortal pelvic inflammatory disease. Defendant testified that he had never performed an abortion, but also admitted that he had done so. He also testified that he had caused his office records in the case to be destroyed. There was evidence that the deceased bled extensively within a short time after the doctor's treatment. A dying declaration was received in evidence wherein Frances Rasmussen stated that she fully realized the seriousness of her present illness and that she might not survive. She certified that "Dr. George H. Buck, 430 S. E. Hawthorne St., Portland, Oregon, did perform upon me at his office, a criminal abortion with my knowledge & consent." We are in entire accord with the findings of the medical board and with the judgment of the circuit court wherein it was held that there was legal evidence supporting the charge.

After the case had been remanded to the circuit court pursuant to our opinion in Board of Medical Examiners v. Buck, 192 Or. 66, 232 P. 2d 791, the secretary of the Board of Medical Examiners filed in the Circuit Court of the State of Oregon for Multnomah County a motion for an order to show cause why an order should not be issued by that court enjoining the said George H. Buck from the practice of medicine and surgery in the state of Oregon until the final decision of the appeal. Supporting affidavits were filed which stated that the defendant was practicing, not only medicine, but abortions, since the order of revocation. The defendant moved to quash the order to show cause upon the ground that the circuit court was without power or jurisdiction to issue said order and upon the further ground that the motion for such order and the supporting affidavits did not state facts sufficient to authorize the issuance of such order. The Circuit court granted the motion to quash and

dismissed the proceeding. The Board relied upon the following statutory provisions:

> "(j) No person whose license has been revoked or suspended by the board shall practice medicine and surgery pending the decision of the court upon appeal from the decision or order of the board." OCLA, § 54-933.
>
> "Except as provided in section 54-902, no person shall practice medicine or surgery in this state without being licensed so to do by the state board of medical examiners. * * *" OCLA, § 54-941.

An appeal was taken by the Board from the decision of the circuit court. Both appeals were argued before this court at the same time, and we will dispose of both in this opinion.

The appeal from the order revoking the defendant's license has now been finally determined and the revocation of the license is affirmed. The question as to the power of the circuit court pending appeal to enforce by injunction the plain provisions of the statute which prohibit a person whose license has been revoked from practicing medicine is now moot. We deem it unnecessary to pass upon the issues thus presented. In declining to rule upon the question, we do not intend to imply any approval of the refusal of the trial court to entertain the motion for an order to show cause. The appeal from the last-mentioned order is dismissed as moot.

The judgment of the circuit court affirming the order of the Board of Medical Examiners revoking the license of the defendant Buck is affirmed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 478

DR. GEORGE H. BUCK,

Appellant,

vs.

BOARD OF MEDICAL EXAMINERS OF THE STATE OF OREGON

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The appellees in the above-entitled cause for their joint statement in opposition to appellant's statement as to jurisdiction herein, and in support of appellees' motion to dismiss or affirm, respectfully show the following:

I. Statement of Issues on Appeal

The question sought to be presented in this appeal is appellant's claim that Chapter 265, Oregon Laws of 1951 amends and repeals O. C. L. A. 54-931, and that since there is no savings clause, this action which was commenced under O. C. L. A. 54-931 should have been dismissed; that since this action was not dismissed George H. Buck defendant-appellant is deprived of his profession and property

rights without due process of law and in violation of the Fourteenth Amendment of the Constitution of the United States.

The statute in question, O. C. L. A. 54-931 at the time of commencement of proceedings for the revocation read as follows: "The Board may refuse to grant license to any applicant who desires to practice medicine and surgery in this state or may suspend or revoke such licenses for any of the following reasons:"

(a) "Unprofessional or dishonorable conduct."

(b) "The procuring or aiding or abetting in procuring an abortion unless such is done for the relief of a woman whose health appears in peril because of her pregnant condition after due consultation with another duly licensed medical physician and surgeon."

Oregon law of 1951, Chapter 265, reads as follows:

Following the semicolon after the words "medical physician and surgeon," under (2) "who is not an associate or relative of the physician and surgeon and who agrees that an abortion is necessary. The record of this consultation shall be in writing and shall be maintained in the hospital where the consultation occurred or in the offices of all physicians and surgeons involved for a period of at least three years after the date of such abortion."

II

The Supreme Court of the United States has no jurisdiction over the petition for appeal by the defendant-appellant because:

(1) The Supreme Court of the state of Oregon construed the new act as a mere continuation of the old act;

(2) The question of whether a new statute impliedly repeals an old act is a question of construction;

(3) The United States Supreme Court is bound by the

construction placed on the state statute by that state's highest court.

The Supreme Court of the State of Oregon in the case of *Board of Medical Examiners* v. *Buck*, 56 Adv. Sheet No. 18, page 1029, 1032, 285 P. (2d), 126, stated as follows: "The 1951 act repealed no part of O. C. L. A. 54-931, (b) It reenacted all of that subsection and merely added other requirements. Insofar as the two acts are the same, the new act is regarded as a mere continuation of the earlier one so that only the new provisions are to be considered as having been enacted at the time of the amendment. 50 AM jur, statutes, Section 468, page 482."

The Supreme Court of the United States in the case of *Posadas* v. *National City Bank of New York*, 56 S. Ct. 349, expressly states that the question of whether a new statute impliedly repeals another is a question of statutory construction: "But, in either case the intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act, and will continue to speak, so far as the two acts are the same, from the time of the first enactment." Further, on page 353: "and even in the fact of a repealing clause, circumstances may justify the conclusion that a later act repealing provisions of an earlier one is a continuation, rather than an abrogation and reenactment, of the earlier act."

The United States Supreme Court is bound by the construction placed on state statutes by that state's highest court *Guaranty Trust Company of New York* v. *Blodgett*, 53 S. Court 244. The Supreme Court in this case states on page 245 "Since the court below construes the Act—we are bound by the decision of that court as though the meaning as fixed by the court had been expressed in the statute itself in specific words."

III

No substantial federal question is presented by the attempted appeal.

There is no merit in the petition for appeal of the defendant-appellant. The Supreme Court of the United States has definitely stated that whether or not a new statute impliedly repeals another is a question of statutory construction. *Posadas* v. *National City Bank of New York, supra.*

The United States Supreme Court is bound by the construction placed on state statutes by that state's highest court. *Guaranty Trust Company of New York* v. *Blodgett, supra.*

The Supreme Court of the State of Oregon has stated that the new act did not repeal the old law.

It is the established law that the Supreme Court of the United States will not take cognizance of any appeal on the question that has been determined adversely to the contention of such appellant.

WHEREFORE, appellees respectfully move that the within appeal be dismissed or that the judgment and decree of the Supreme Court of the State of Oregon be affirmed.

(S.) HOWARD I. BOBBITT,
Attorney for Plaintiff-Appellee,
609 Failing Building,
Portland, Oregon.

(1930)

No. 478. BUCK *v.* BOARD OF MEDICAL EXAMINERS OF OREGON. Appeal from the Supreme Court of Oregon. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. MR. JUSTICE BURTON took no part in the consideration or decision of this case. *Ralph E. Moody* for appellant. *Howard I. Bobbitt* for appellee. Reported below: 200 Ore. 488, 258 P. 2d 124.